

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-6144

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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P/S

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WAN SHIH HSIEH,

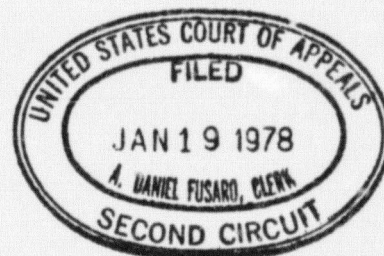
Petitioner,

- against -

MAURICE F. KILEY, District Director
Immigration and Naturalization Service,
United States Department of Justice,

Respondents.
-----X

Docket NO. 77-6144



PETITION FOR REHEARING
AND SUGGESTION FOR
REHEARING EN BANC

LAW OFFICES OF DAVID C. BUXBAUM, P.C.
Attorneys for Petitioner

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- X
WAN SHIH HSIEH,

Plaintiff-Appellant,

- against -

MAURICE F. KILEY, District Director,
Immigration and Naturalization Service,
United States Department of Justice,

Defendant-Appellee.
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Docket No. 77-6144

PETITION FOR REHEARING
AND SUGGESTION FOR
REHEARING EN BANC

Plaintiff-Appellant respectfully presents this, its
petition, for rehearing and suggestion for rehearing en banc of
the decision of this Court of January 12, 1978 (a copy of which
is attached hereto), in the above-captioned case.

I. PRELIMINARY STATEMENT

In an opinion of the Hon. Walter R. Mansfield, joined
in by the Hons. J. Edward Lumbard and J. Joseph Smith, the Court
held that the I.N.S. has no duty to conduct an investigation for
the purpose of determining whether visas should be issued to aliens
in foreign countries by the State Department pursuant to 8 U.S.C.
§1105 which imposes just such a duty and which was read to the Court
during the oral argument of this case.

II.

STATEMENT OF FACTS

Appellant respectfully refers the Court to the Statements of Facts in appellant's brief and reply brief.

Briefly, however, the key facts are as follows:

Appellant was granted permanent resident status on November 9, 1973, and immediately thereafter she petitioned the I.N.S. to grant her children second preference status under 8 U.S.C. §1153 (a)(2). These petitions were approved on April 9, 1975, and on July 15, 1975, the children applied to the United States Consulate in Taiwan for immigrant visas. Thereafter, in September, 1975, the Consul requested the I.N.S. to investigate appellant's previous employment in Taiwan. To this date the I.N.S. has not responded to the Consul's inquiry.

III.

QUESTIONS PRESENTED

Does the I.N.S. have a duty to respond to the inquiry of the United States Consulate in Taiwan?

IV.

ARGUMENT

A. Statutory Duty of the Immigration and Naturalization Service

Circuit Judge Mansfield, in his opinion, states that:

"... the INS is under no duty to conduct an investigation for the purpose of determining whether visas should be issued to aliens in foreign countries by the State Department pursuant to §104 of the Act, 8 U.S.C. §1104."

That this is not so, is made clear by 8 U.S.C. §1105, which was read to the referenced panel during the oral argument of this case and which provides:

"The Commissioner and the administrator shall maintain direct and continuous liaison with each other with a view to a coordinated, uniform and efficient administration of this chapter, and all other immigration and nationality laws."* (Emphasis supplied)

Quite clearly then, the appellee has a clear and inescapable duty to maintain liaison with the State Department and the referenced panel erred in holding otherwise.

1. Statutory Requirement that Immigration
and Naturalization Service Forward
Petition to Consul

As admitted by the defendants, the plaintiff's children are beneficiaries of approved second preference petitions.

Title 8 C.F.R. Sec. 204.3 states that:

If the beneficiary of an approved petition will apply to an American consulate for a visa, the approved petition shall be forwarded to the consulate designated by the petitioner.

It is quite clear therefore that in the case of the children of the plaintiff, the Immigration and Naturalization Service is required to forward the approved petition". . . to the consulate designated by the petitioner."

* (1) 8 U.S.C. §1101(a)(1) reads as follows:

The term "administrator" means the administrator of the Bureau of Security and Consular Affairs of the Department of State.

8 U.S.C. §1101(a)(8) reads as follows:

The terms "Commissioner" and "Deputy Commissioner" mean the Commissioner of Immigration and Naturalization and a Deputy Commissioner of Immigration and Naturalization, respectively.

2. Requirement that Immigration and
Naturalization Service Respond
to Inquiry from Consulate

It cannot be alleged that the forwarding of said petition means that the Immigration and Naturalization Service has no responsibility to respond to questions about said petitions that are raised by the appropriate consulate. The Immigration and Naturalization service clearly has such a responsibility, in view of its previously described duty to "maintain [a] direct and continuous liaison with [the administrator of the Bureau of Security and Consular Affairs of the Department of State] with a view to a coordinated, uniform and efficient administration of. . . all . . . immigration and nationality laws." 8 U.S.C. §1105.

What kind of "coordinated, uniform and efficient administration" could there be if the I.N.S. was free to ignore all inquiries from consulates abroad?

It has been alleged that there is a problem with the permanent resident status of the plaintiff because one of her sons, who, parenthetically, was an infant at the time all these things occurred, stated to the consul that the plaintiff did not work as a cook when she was on Taiwan. There is, of course, no question that the plaintiff has been and is working as a cook in the United States. If, indeed, there was actual belief that there was some problem with plaintiff's adjustment of status, pursuant to 8 C.F.R. Secs. 205.2 and 205.3, revocation proceedings could be initiated, but only on notice to the plaintiff.

3. Revocation Proceedings

8 C.F.R. Sec. 205. 2 provides in part that:

The approval of a petition made under Sec. 204 of the Act. . . may be revoked. . . by any officer authorized to approve such petition when the propriety of such revocation is brought to the attention of the Service, including requests for revocation or reconsideration made by consul officers. (Emphasis supplied)

8 C.F.R. Sec. 205. 3 provides:

Revocation. . . of a petition under Sec. 205.2 shall be made only upon notice to the petitioner who shall be given an opportunity to offer evidence in support of the petition and in opposition to the grounds alleged for revocation of the approval..

Sec. 205.3 goes on to require that if an application has been made for a preference for a child, as is the case in these proceedings, the Immigration and Naturalization Service shall communicate with the consul office". . . having jurisdiction over the visa application (which) shall be notified of the revocation."

Thus in any case, the Immigration and Naturalization Service is required to communicate with the United States Consular Office in Taiwan.

In addition, internal procedures of the Immigration and Naturalization Service make it mandatory that responses be made to inquiries coming from consulates abroad regarding preference petitions forwarded to the local U.S. Consul.

It is further interesting to note that 8 C.F.R. Sec. 246.1

mandates, in the case of a rescission, ". . . a proceeding shall be commenced by the personal service upon such person of a notice of intention to rescind, which shall inform him of the allegations upon which it is intended to rescind the adjustment of his status."

Thereafter, the remaining portion of Sec. 246 provides for procedures involved in a rescission proceeding. It is manifest that the Immigration and Naturalization Service has to date not commenced any rescission proceedings. In fact, there is clearly no basis upon which rescission will lie in a case like this.

4. Consul Also Required to Act

Further evidence of the mandatory nature of the action of the Immigration and Naturalization Service is explicated in Title 22 C.F.R., Sec. 42.41, which provides:

No alien shall be issued a visa as an immediate relative unless the consular officer has received from the Immigration and Naturalization Service a petition filed and approved in accordance with Sec. 204 of the Act.

Sec. 42.43 of title 22 of the C.F.R. provides that:

(a)(1) The consul office shall suspend action in a petition case and shall return the petition with the report of the facts in the case, for reconsideration by the service if the . . . consular officer knows or has reason to believe that the approval of the petition was obtained by fraud, misrepresentation, or other unlawful means, or that the beneficiary is not entitled, for any other reason, to the status approved.

Thus finally, it is quite clear that neither the defendant Immigration and Naturalization Service nor the Department of State

is immune from the requirements of law. If there are indeed reasons to believe that the petition is not valid, the consular official is required by law to return said petition for reconsideration, and the Service is required by law to re-examine said petition.

In this particular case neither action, to the knowledge of the plaintiff, has occurred.

B. Abuse of Authority by Immigration
and Naturalization Service

In view of the obligation of the I.N.S. to act in this case, it is clear that there has been a blatant abuse of authority, and thus a writ of mandamus is proper.

Quite simply, a delay of over two years in responding to a simple inquiry is "official conduct. . . so far beyond any rational exercise of discretion as to call for mandamus. . . ." United States ex rel. Schonbrun v. Commanding Officer, Armed Forces, 403 F.2d 371, 374 (2d Cir. 1968), Cert. denied 394 U.S. 929 (1969). See also, Lovaglio v. Forehlke, 468 F. 2d 340, 346 (2d Cir. 1972), Cert denied 411 U.S. 918 (1973); Nixon v. Secretary of the Navy, 422 F.2d 434, 939, (2d Cir. 1970).

That this is so, is made even more manifest by the clear statutory purpose of the Immigration and Nationality Act - to reunite families.

"The legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the problem of

keeping families of United States citizens and immigrants united."
H.R. Rep. No. 1198, 85th Congress, 1st Sess., p. 7 (1957). See also,
H.R. Rep. No. 1365, 82nd Cong., 2d Sess. 29 (1952), U.S. Code Cong.
and Admin. News 1952, pp. 1653, 1680 (statute implements "the under-
lying intention of our immigration laws regarding the preservation
of the family unit."; 103 Cong. Rec. 15497 (1957) (remarks of Sena-
tor Pature(("This bill is praiseworthy in its fundamental purpose--
to reunite families."); Immigration Service v. Errico, 385 U.S., 214,
220 (1966) ("The intent of the Act is plainly to. . . [keep] family
units together."); Fiallo v. Levi, 406 F. Supp. 162, 171 (E.D.N.Y.
1975) (dissenting opinion) ("The legislative history and the statu-
tory scheme leave no doubt that the exclusive purpose of Congress
was to maintain or reunite family units which include United States
citizen or permanent resident members. . ."); Fiallo v. Bell, 97 S.
Ct. 1473, n.6 (1977). (Emphasis supplied)

"To accomodate this goal Congress has accorded a special
'preference status' to certain aliens who share relationships with
citizens or permanent resident aliens." Fiallo v. Bell, 97 S. Ct.
1473, n.6 (1977). (Emphasis supplied)

Appellee's action - or more appropriately, inaction - in
the instant case, flies directly in the face of this perfectly clear
Congressional policy and frustrates its achievement by keeping
appellant and her family from being reunited. It is difficult to
conceive of a clearer or more damaging abuse of authority.

V.

CONCLUSION

WHEREFORE, upon the foregoing grounds, and upon all the grounds set forth in our papers previously submitted and on file with this Court, it is respectfully urged that the petition should be granted and the order appealed from reviewed by this Court sitting en banc.

Respectfully submitted,

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Attorneys for Petitioner

By: _____

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1
2 UNITED STATES COURT OF APPEALS
3 FOR THE SECOND CIRCUIT

4 No. 439

September Term 1977

5 Argued: December 5, 1977

Decided: January 12, 1978

6 Docket No. 77-6144

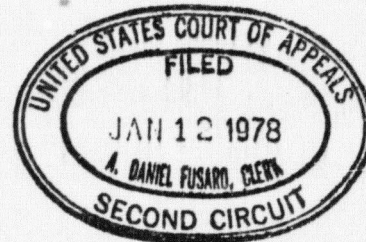
7 -----x
8 WAN SHIH HSIEH,

9 Plaintiff-Appellant,

10 -against-

11 MAURICE F. KILEY, District
12 Director, Immigration and
Naturalization Service, United
States Department of Justice,

13 Defendant-Appellee.



14 -----x
15 Before LUMBARD, SMITH and MANSFIELD, Circuit
16 Judges.

17
18 Appeal from an order of the Southern District of
19 New York, Lloyd F. MacMahon, Judge, dismissing a complaint
20 by a permanent resident alien of Chinese origin seeking an
21 order directing the Immigration and Naturalization Service
22 to complete an investigation requested by the United States
23 Consul into whether appellant's status had been acquired
24 through fraud and ordering the Consul to issue immigration
25 visas to appellant's children in Taiwan.

26 Affirmed.

27
28 DAVID C. BUXBAUM, Esq., New York,
29 N.Y., for Plaintiff-Appellant.

30 ROBERT S. GROBAN, JR., Special
31 Assistant United States Attorney,
New York, N.Y. (Robert B. Fiske,
32 Jr., United States Attorney for the
Southern District of New York,
Patrick H. Barth, Assistant United
States Attorney, New York, N.Y., of counsel
for Defendant-Appellee.

1
2 MANSFIELD, Circuit Judge;

3 Wan Shih Hsieh, a permanent resident alien of
4 Chinese origin, appeals from an order of the Southern District
5 of New York, Lloyd F. MacMahon, Judge, dismissing her
6 complaint, which purports to invoke federal jurisdiction
7 under the Declaratory Judgment Act, 28 U.S.C. §§2201, et seq.,
8 and Administrative Procedure Act, 5 U.S.C. §§701, et seq.,
9 seeking an order directing the Immigration and Naturalization
10 Service ("INS") to pursue and complete an investigation
11 requested of it by the United States Consul in Taiwan into
12 the question of whether her permanent resident status should
13 be rescinded pursuant to §246(a) of the Immigration and
14 Nationality Act (the "Act") on the ground that it had been
15 acquired through fraud. 8 U.S.C. §1256(a). We affirm, but
16 with clarification as to the INS's investigative duties in
17 the matter, in view of the district court's opinion on this
18 subject.

19 Appellant, a native and citizen of Taiwan, was in
20 1966 admitted into the United States as a non-immigrant,
21 leaving her husband and three children in Taiwan. In
22 February, 1973, appellant invested \$7,000 in the Hsin Hsin
23 Chinese Restaurant in Brooklyn, becoming a shareholder of
24 the corporation that owns the restaurant. On April 11, 1973,
25 the United States Department of Labor issued a labor
26 certification to the restaurant authorizing employment of
27 appellant as a specialty chef on the basis of her sworn
28 statement that from 1959 through 1966 she had been employed
29 as a chef in the Kwok Kong Restaurant in Taipei City, Taiwan.
30 Armed with this certificate, the Hsin Hsin Restaurant on
31 April 30, 1973, petitioned the INS to qualify appellant as a
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1 sixth preference immigrant pursuant to §203(a)(6) of the Act,
2 8 U.S.C. §1153(a)(6), which was approved on August 9, 1973.
3 On November 9, 1973, appellant's status was accordingly
4 adjusted by the INS to that of permanent resident alien, see
5 ¹ §245 of the Act.
6

7 Having successfully gained permanent resident status
8 for herself, appellant next sought to assist her children in
9 Taiwan to enter the United States as immigrants by petitioning
10 the INS on their behalf to grant them second preference
11 status under §203(a)(2) of the Act, 8 U.S.C. §1153(a)(2).²
12 On April 9, 1975, the INS approved these preference petitions
13 and on July 15, 1975, the children applied to the United
14 States Consulate in Taiwan for immigrant visas. In reviewing
15 their applications the Consul discovered that appellant's
16 "household register," an official record kept by the Taiwan
17 government of her education, occupation and employment, did
18 not reveal her claimed earlier employment at the Kwok Kong
19 Restaurant in Taipei City, which had been the predicate for
20 her United States labor certification, sixth preference
21 classification, and adjustment of status, which in turn was
22 the predicate for approval of her children's visa applications
23 as second preference immigrants.

24 Apparently suspecting that appellant's status may
25 have been procured by fraud, the Consul held up issuance of
26 the visas to her children and requested the INS to forward
27 copies of her adjustment application and to investigate the
28 basis of her adjustment of status and whether she had in fact
29 worked as a chef at the Kwok Kong Restaurant in Taipei City
30 as represented. In the meantime appellant's son executed
31 in Taiwan a sworn statement that his mother had not to his
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1 knowledge worked as a chef in Taiwan before going to the
2 United States but had worked as a pedicab driver.
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4 On August 2, 1976, the INS conducted an interview
5 of appellant in which it sought unsuccessfully to elicit
6 information from her regarding her employment as a chef in
7 Taiwan before coming to the United States in 1966. The
8 interview proved a failure, principally because of differences
9 over the accuracy of the interpretation (appellant does not
10 speak English) and objections to the relevancy of questions.
11 On the following day, appellant instituted the present
12 action, claiming unreasonable delay by the INS in its
13 investigation and seeking an order directing the Consul to
14 issue the immigration visas to the children and directing
15 the INS to complete its investigation and furnish its report
16 immediately to the American Embassy in Taiwan concerning
17 whether appellant had fraudulently obtained her status. In
18 the alternative, appellant sought an order granting the visas
19 to the children and a declaratory judgment that the children
20 are eligible for adjustment of status and that the INS's
21 failure to respond to the Consul and to appellant's petition
22 is illegal. After an initial application for immediate
23 relief was, after hearing, denied by Judge Wyatt, and
24 appellant thereafter failed to comply with pretrial orders
25 issued by the district court, Judge MacMahon, by memorandum
26 opinion dated August 24, 1977, denied plaintiff's motion for
27 summary judgment and granted defendant's motion to dismiss
28 the complaint.

29 Judge MacMahon held that the federal court lacked
30 jurisdiction to review the Consul's decision and that, although
31 the INS owed a duty to complete within a reasonable time
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2 its investigation into possible fraud on appellant's part in
3 obtaining her status as a permanent alien resident (at least
4 insofar as the issue was relevant to her petitions to the INS
5 for preference status for her children as a basis for their
6 immigration), the INS had not abused its discretion in failing
7 to do so by the time this action was commenced, in view of
8 all of the circumstances, including "the low priority given
9 to such investigations and the other prior investigative
10 responsibilities of INS." From this order Hsieh appeals.

11
12 DISCUSSION

13 The district court correctly held that no
14 jurisdictional basis exists for review of the action of the
15 American Consul in Taiwan suspending or denying the issuance
16 of immigration visas to appellant's children there. It is
17 settled that the judiciary will not interfere with the visa-
18 issuing process. Gomez v. Kissinger, 534 F.2d 519 (2d Cir.
19 1976); Pena v. Kissinger, 409 F. Supp. 1182, 1185-88 (S.D.N.Y.
20 1976). In Kleindienst v. Mandel, 408 U.S. 753, 766 (1972),
21 the Supreme Court stated the basic principle:

22 "The power of Congress to exclude aliens
23 altogether from the United States, or to
24 prescribe the terms and conditions upon which
25 they may come to this country, and to have its
26 declared policy in that regard enforced exclusively
27 through executive officers, without judicial
28 intervention, is settled by our previous
29 adjudications."

30 The jurisdiction of federal courts to review the
31 INS's action in conducting or completing an investigation
32 requested by some other branch of the government, such as the
State Department, would similarly depend on the existence of

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2 a statutory authorization or mandate from Congress. No such
3 authorization is shown or appears to exist. The Declaratory
4 Judgment Act, 28 U.S.C. §§2201, et seq., cited in appellant's
5 complaint is remedial, not jurisdictional, Schilling v.
6 Rogers, 363 U.S. 666, 677 (1960); Skelly Oil Co. v. Phillips
7 Petroleum Co., 339 U.S. 667, 671 (1950), and the Administrative
8 Procedure Act, also cited, does not provide subject matter
9 jurisdiction. Califano v. Sanders, 430 U.S. 99, 105 (1977);
10 Small v. Kiley, ___ F.2d ___ (2d Cir. March 9, 1977), Slip
11 Opin. 2221, 2224 n.1.

12 Although not referred to as a jurisdictional basis
13 in her complaint, appellant now contends that the district
14 court is empowered to compel the INS to complete its
15 investigation into her immigration status by 28 U.S.C. §1361,
16 which authorizes district courts to assume jurisdiction over
17 "any action in the nature of mandamus to compel an officer
18 or employee of the United States ... to perform a duty owed
19 to the plaintiff." Putting aside the question of whether
20 appellant, in view of the INS's offer to continue its
21 investigation if appellant will cooperate, is eligible to
22 invoke such relief, appellant's contention must be rejected
23 for the reason that the INS is under no duty to conduct an
24 investigation for the purpose of determining whether visas
25 should be issued to aliens in foreign countries by the State
26 Department pursuant to §104 of the Act, 8 U.S.C. §1104. The
27 sole duty of the INS in this context was to determine whether
28 appellant's petition for preference status for her children
29 in Taiwan, based on their relationship to her, should be
30 granted under §203(a)(2) of the Act, 8 U.S.C. §1153(a)(2),
31 see 8 C.F.R. §204, 22 C.F.R. §42.40. This it has done,
32 approving appellant's preference petition on April 9, 1975.

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2 The investigation which appellant seeks to compel
3 the INS to complete in the present action is not directed
4 toward the preference petitions for the children but the
5 question of whether appellant fraudulently acquired her
6 immigration status. Whether the INS pursues this latter
7 inquiry further and, if so, whether it will institute
8 proceedings to rescind her status are matters solely within
9 the INS's discretion, see United States v. Santelises, 476
10 F.2d 787, 790 (2d Cir. 1973); United States ex rel. Mascucci v.
11 Follette, 272 F. Supp. 563, 565 (S.D.N.Y. 1967), and hence
12 are not reviewable under the Administrative Procedure Act or
13 28 U.S.C. §1361. Moreover, the INS has five years from the
14 date when appellant acquired her permanent resident status
15 within which to institute rescission proceedings. Zaoutis v.
16 Kiley, 558 F.2d 1096 (2d Cir. 1977). In short, neither the
17 children's application for admission into the United States
18 as immigrants nor the Consul's request to the INS create a
19 duty on the part of the INS to appellant to investigate whether
20 rescission proceedings should be instituted, much less to
21 complete any such investigation within a shorter period than
22 that provided by §246(a) of the Act, 8 U.S.C. §1256(a).
23 Aside from our powerlessness to intervene, the judicial
24 creation of such a duty would have the potential for
25 mischievous interference with the functioning of already
26 overburdened administrative agencies.

27 In stating in its opinion that the INS had a duty
28 under 8 C.F.R. §205 and 22 C.F.R. §42.43 to conduct and
29 complete the investigation requested by the Consulate, the
30 district court appears to have confused the INS's duty to act
31 on preference petitions, which are concerned solely with the
32 family relationship between the parties, with the question of

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2 whether the INS must investigate alleged fraud in obtaining
3 a permanent resident status. These matters are entirely
4 separate and distinct. Since there is no question as to the
5 parent-child relationship between appellant and her children
6 in Taiwan, the preference petitions were approved by the INS
7 on April 9, 1975. The INS's duty in the matter ended there.
8 To the extent that the district court's opinion states that
9 the INS is under a further duty to investigate a fraudulently-
10 obtained preference status it is vacated.

11 The order of the district court is affirmed.
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F O O T N O T E S

1. Appellant's application was denied to the extent that it sought to adjust the status of her children also to permanent resident aliens. This relief was not available to appellant's children under §245 since they were not in the United States but in Taiwan.
2. The purpose of this procedure is merely to verify the relationship between the permanent resident in the United States and his or her relatives located outside of the United States in order to determine whether the latter qualify for preferential treatment under §203 of the Act. See 8 C.F.R. §204.1(a).

AFFIDAVIT OF SERVICE

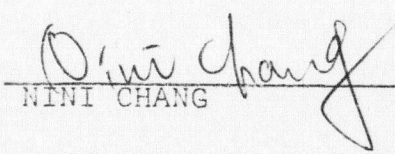
STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

NINI CHANG, being duly sworn, deposes and says:
That deponent is not a party to the action, is over 18 years of age
and resides at Elmhurst, New York.

That on the 19th day of January , 1978, deponent served
the within PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
upon:

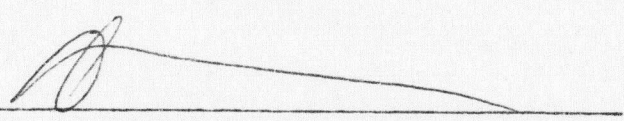
Robert B. Fiske, Jr., Esq.
United States Attorney for the
Southern District of New York
One St. Andrew's Plaza Annex
New York, New York 10007

the address(es) designated by said attorney(s) for that purpose by
depositing a true copy of same enclosed in a postpaid properly
addressed wrapper, in an official depository under the exclusive
care and custody of the United States Postal Service within the
State of New York.



NINI CHANG

Sworn to before me this
19th day of January , 1978.



DAVID C. BUXBAUM
NOTARY PUBLIC, State of New York
No. 4610648
Qualified in Kings County
Commission Expires March 30, 1979

